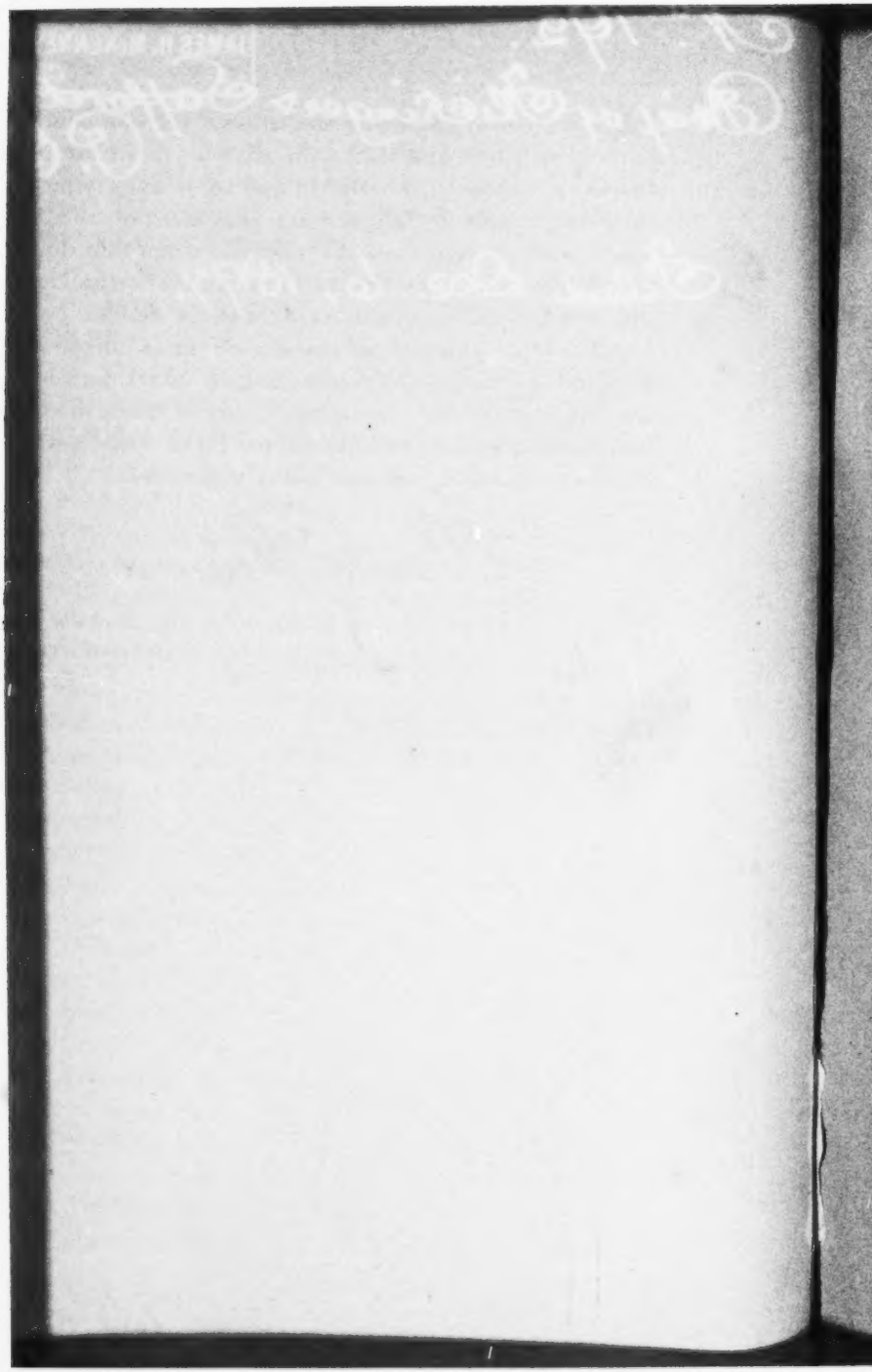

No. 192.

Brief of Flickinger v Safford &c.

# Supreme Court of the United States.

No. 102.

Filed Dec. 6, 1897.

DANIEL DULL AND NELLIE M. DULL,
*Plaintiffs in Error,*

*against*

JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE AND GEORGE F. WRIGHT,
*Defendants in Error.*

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## Brief and Argument for Plaintiffs in Error on the Motion to Dismiss or Affirm.

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(EVENING POST BUILDING.)

1897.

# Supreme Court of the United States.

DANIEL DULL and NELLIE M. DULL,
Plaintiffs in Error,

AGAINST

JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE and GEORGE F. WRIGHT,
Defendants in Error.

No. 192.

## Brief and Argument for Plaintiffs in Error on the Motion to Dismiss or Affirm.

The statement in the first paragraph of the motion, to the effect that Phelan, Duffie and Wright are the only defendants served with the citation to appear in this Court, repeated also in the brief accompanying the motion, is not understood, in view of the writ of error (p. 137) and the citation (p. 138) addressed to *John E. Blackman*, Ed. Phelan, E. R. Duffie, George F. Wright, or to W. S. Strawn, E. R. Duffie and Wright & Baldwin, their attorneys, and in which they are described as *defendants in error*, they are brought fully within the jurisdiction of the Court by an acceptance of service on the 29th day of May, 1896, by Winfield S. Strawn and Wright & Baldwin, attorneys for the defendants in error (p. 139).

The matters in controversy in this proceeding arise from the following facts:

It appears that in the year 1703 the Bloomingdale road in the City of New York was laid out upon land belonging to one John Hopper, who died in 1706, and in the year 1847 that road was partly discontinued and a new road (now Broadway) was laid out, following substantially the line of the old Bloomingdale road, but at some points varying therefrom, one of such places being at its intersection with Fifty-first street, where there was a strip of such ground lying between the easterly limits of the abandoned Bloomingdale road and Broadway, as now located.

Upon this abandoned part of the road the plaintiff in error, as a tenant under Lyon, had erected a building at a cost of more than forty-five thousand dollars ($45,000), and he claimed to have a verbal arrangement with his landlord, under which the latter was to purchase the building at the termination of the lease, and in 1889 that time was near at hand.

The strip of ground upon which the plaintiff in error had constructed his building had reverted by operation of law to the heirs of John Hopper, some two hundred in number. About that time the defendants in error, Blackman, Wright and Duffie, organized a sort of a syndicate to obtain the title of the Hopper heirs, and put themselves into communication with the plaintiff in error and opened negotiations with a view to sell to him the title of the Hopper heirs in the little strip of ground; these negotiations finally resulted in an agreement between the parties, and in consideration of the deeding by the plaintiff in error to the defendant Blackman of five hundred and fifty (550) acres of land in Pottawattamie County, Iowa, Blackman agreed to vest the plaintiff in error with eighty-five per cent. (85%) of the title, and at that time delivered a deed to be held in escrow, and also a mortgage to the plaintiff in error expressed to be for the con-

sideration of ten thousand dollars ($10,000), which it was understood was to be left unrecorded for an indefinite time. The deed of Dull and wife conveying the Iowa land is dated June 28, 1889.

Blackman's first move in the direction of defrauding the plaintiff in error was to sell and convey surreptitiously and without the knowledge of the plaintiff in error to one Lyon, the plaintiff's landlord, the same interest in the strip of ground which he had formerly sold to the plaintiff in error, so that the consideration for the conveyance of the Iowa land, which is the land now in controversy in this suit, wholly failed.

Blackman's next fraudulent step was to deed, on the 2d day of August, 1889, the entire tract of Iowa land to one George F. Wright, the consideration of which was pretended to be a promise on the part of Wright to advance money in the future to aid Blackman in forwarding his New York projects; but Wright never advanced any money, and by the decree of the Supreme Court of the State of Iowa in this proceeding it was found that no money or other valuable consideration had been paid by Wright, and his deed by order of that Court was canceled.

During Wright's ownership he had mortgaged the same property to one Askwith, this mortgage, however, cuts no figure, in this case, as it was not seriously relied upon at the hearing, and was also ordered by the Court to be canceled. We refer to it, however, only for the purpose of accounting for the appearance of Askwith as a defendant in this case.

February 2, 1892, Blackman commenced his suit against Wright and Askwith, claiming the facts as above found by the Supreme Court of Iowa, that the conveyance by Blackman to Wright was made upon a consideration which had wholly failed.

Dull had brought home to Blackman the fact that he had found out that Blackman had deeded the property he had sold him to Lyon; Blackman ad-

mitted his fault and declared his intention to right the wrong he had occasioned to the extent of reconveying the Iowa lands, but he was confronted with the deed to Wright, which purported upon its face to convey an absolute title, and Dull knew that Blackman had instituted the suit for the cancellation of the deed to Wright, and made no objection to its prosecution because it would enable Blackman the better to make restitution of the lands.

The suit in the District Court of Iowa proceeded without incident until the 17th day of September, 1892, when the defendant Ed. Phelan filed his petition for intervention in the cause, setting forth that on the 30th day of January, 1892, Blackman was the equitable owner of the lands described in his petition and had conveyed to him an absolute title thereof. Phelan appears to have been a mere speculator in the title, risking but seventy-five dollars ($75), and he was to make advances to Blackman not exceeding, however, one thousand dollars ($1,000) in all; what part of that amount of money, if any, he has advanced other than the seventy-five dollars ($75) does not appear. Although Phelan obtained the title January 30, 1892, three (3) days before the suit was brought in Iowa, it was understood evidently that the deed was not considered as having any vitality until the 15th day of September, 1892, when Blackman and Phelan entered into an arrangement as to what should be done with the estate after Blackman quieted the title in himself.

Having agreed among themselves how they would divide the plunder, Phelan filed his petition of intervention two (2) days following the execution of the agreement, and in his petition brings to the attention of the Court the fact that Dull and other persons claim to be interested in the subject matter of the suit and prayed to have them made parties defendant. This is the first mention of Dull's name in connection with the Iowa suit; it does not appear that Dull knew of this intervention of Phelan and the attempt to make him a party to the suit prior to

the 2d day of November, 1892, when he instituted his suit in New York; but when he ascertained that Blackman was not prosecuting the suit for the purpose of enabling him to make restitution of the land as he had claimed, and had involved the estate in a further complication by the conveyance to Phelan, seventeen (17) days after Phelan intervened, Dull instituted his suit November 2, 1892, in the Supreme Court of Westchester County, New York, against Blackman and his wife, Wright, Askwith, Phelan and Duffie, claiming that the consideration for the deed of the Iowa lands was procured by fraudulent representations and concealment and that the consideration had wholly failed, and asking for an injunction against the defendants, restraining them from attempting to convey the lands in question and the defendant Blackman from further prosecuting the suit in Iowa or permitting it to be prosecuted, and on the 9th day of November, 1892, the Supreme Court of New York issued a writ of injunction *pendente lite* to be found on page 46 of the Record.

Service of the summons in this case was made upon Blackman personally within the State of New York; Blackman appeared therein by J. Albert Lane, his attorney, filed his answer (p. 56), cross examined the plaintiff (p. 51) and testified (p. 54), and in his testimony says as follows: I am "the principal defendant in the suit in Westchester County, New York, entitled Dull *vs.* Blackman and others, and I appeared in that case by counsel and contested the action on its merits."

Further service of the summons in the New York suit was made by delivering to the other defendants therein at Omaha, Nebraska, and Council Bluff, Iowa, on the 24th day of December, 1892. a certified copy of the proceedings theretofore had therein and the preliminary injunction regularly issued and in the manner above stated served upon all the defendants, continued in force without having been in the least modified, vacated or set

aside until the Special Term of that Court held in April and May, 1893, when a final decree was rendered sustaining the claim of the plaintiff in error in every particular (p. 62), setting aside the conveyance by Dull to Blackman of the land in controversy here, on the ground of fraudulent representations, concealment and failure of consideration, and ordering all the defendants to make restitution, and issued a perpetual injunction against them which has remained in full force from that time until this.

All the defendants were again fully informed of the fact of the pendency of the injunction against them by the pleadings of Dull and wife, filed in the Iowa Court, February 3, 1893.

Hence it appears that on the 9th day of November, 1892, more than two months before Duffie withdrew his appearance for Blackman and was permitted by the Iowa Court to prosecute the action thereafter in Blackman's name for and in behalf of Ed. Phelan as intervenor, Blackman had been continuously enjoined from prosecuting that suit or permitting it to be prosecuted, and the other defendants were also named in the same injunction, and although they had full knowledge of it, now claim not to be bound by it, upon the ground that the personal service on them outside of the State of New York does not give them sufficient and such notice as they are bound to respect. The injunction being certainly in force against Blackman, he could not therefore prosecute the suit, and it is difficult to see how anyone could intervene and prosecute the suit in his name, particularly Phelan could not do so, as he was a party having knowledge of the injunction, and as intervenor could not have as the successor of Blackman any other or greater rights or privileges in regard to it than Blackman then had.

A very large portion of the record is taken up with amendments to the bill, the answers of the several defendants and amendments thereto which this motion need not be specially referred to; Dull and his wife became parties February 2, 1893, to the

suit in Iowa and upon their first appearance filed a plea in abatement to the proceedings based upon the facts of the pendency of the suit in the Supreme Court of New York and filed with their plea a transcript of the proceedings up to that time and upon the rendition of final judgment in New York filed another answer *puis darrein* continuance accompanied by a transcript of the proceedings and decree in that Court to be found on pages 42, &c., of the Record.

Although at the very outset of Dull's appearance in the Iowa suit, there was brought into this record the fact of the New York suit and its determination in favor of the plaintiff in error, the Iowa Courts and all the defendants in error have ignored the New York proceedings in which they were all under injunction not to prosecute the suit or permit it to be prosecuted and in order to evade the injunction and have attempted to give Phelan, the speculative intervenor, the right to take control of the litigation in Blackman's name and have re examined the whole case as between Blackman and Dull, in regard to the fraud that was perpetrated by him upon Dull in the State of New York, and the other matters involved in the suit there, and have attempted to reopen all the questions settled finally between them by the decree of the New York Court, and have determined that that judgment is without force and affect and that Blackman was not guilty of swindling the plaintiff out of his land, contrary to what that Court had decided, this attempt on the part of the District and Supreme Courts of Iowa to nullify the judgment of the Supreme Court of New York, the Federal question involved in this case, under Section 1 of Article IV. of the Constitution of the United States, which requires that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

## Argument on motion to dismiss.

The motion to dismiss is founded upon five different grounds, all, however, depending upon one legal proposition, and that is that where a Federal question is associated with other independent questions, not of a Federal character and each is broad enough to sustain the judgment without any regard to the Federal question, the plaintiff in error shall take nothing by his writ; this is undoubtedly a correct statement of the rule, but the case at bar does not present that situation. The alleged independent questions were all personal to Blackman and Dull. The fraud of Blackman in obtaining from Dull the conveyance of the Iowa lands, the entire failure of the consideration for making the conveyance, whether Dull failed to restore, or offered to restore, what he had received from Blackman or had settled with Blackman, or was guilty of laches in not seasonably prosecuting his claim are all shown to have occurred before Blackman instituted his action in the Iowa Courts, and these questions were all finally and definitely settled by the judgment of the Supreme Court of the State of New York; that Court found the fact of fraud, entire failure of consideration and they did not find nor did Blackman in his defense in the New York suit claim that Dull was guilty of laches because he had not restored to him the utterly worthless mortgage and deed which Blackman had placed unrecorded in escrow, there was no laches for he had made an absolute conveyance to Dull's landlord of the property which he had previously mortgaged to Dull; evidently there was nothing to restore and it does not appear that this worthless mortgage and deed had ever left the possession of the third person in whose hands it was held as an escrow; while in the hands of the third person it was as much in the possession of Blackman as it was in the possession of Dull; it is absurd therefore to say that Dull neglected to restore what he had re-

ceived, for in point of fact he had received nothing, nor is it true that Dull had settled with Blackman. Blackman and Dull both testified that there was no settlement, and the testimony of Duffie is contradictory to itself upon that point.

The Supreme Court of Iowa did not so find; that Court says (p. 130), that there is a dispute as to whether a settlement was in fact reached between Dull and Blackman. At the meeting in Chicago there was an arrangement looking to a settlement, but not a settlement of itself; Blackman had an understanding with Dull; that he in his endeavor to right the wrong he had perpetrated, he would institute proceedings to get rid of the fictitious deed to Wright, and would upon quieting his title reconvey the lands to Dull, but such an arrangement was far from being a settlement, and if it was intended for a settlement Blackman afterwards executed a deed carrying full title to Phelan. Blackman thereby destroyed all the consideration if any there was for such arrangement, so also in regard to the pretended laches of Dull in not asserting his claim of fraud with celerity, until Dull became aware of the surreptitious deed to Phelan he was led to believe that Blackman was endeavoring to place himself in such a position that he could reconvey the estate to Dull as he confesses he ought to do; all of these questions were subject matters of litigation in the New York suit, were all purely personal between Blackman and Dull, and without reference to the other defendants and were all finally and fully settled and determined by the judgment of the New York Supreme Court in May, 1893, upon the suit brought by Dull in the November preceding.

Each and every one of there causes which are put forth as reasons for the dismissal of the suit, were therefore not independent of the Federal question, but were closely interwoven with it, and as an entirety make the Federal question, which authorizes this writ of error.

After the decision of the New York Court had been brought into this case as a matter of abatement, the Iowa Court did not give to the judgment of that Court full faith and credit to which it was and is entitled, but ignored it and undertook to re-examine and to determine one of the questions litigated in the New York suit. Had full faith and credit been given to that judgment, the fact of fraud of failure of consideration, &c., by the Iowa Courts, those Courts could not by any possibility have rendered a judgment adverse to the plaintiff in error.

On the 9th day of November, upon the application of Dull to the Supreme Court of New York, in the suit against Blackman and the other defendants in this proceeding, and in which Blackman was personally served with notice in the State of New York, he entered an appearance, cross-examined witnesses and testified, while the other defendants were personally served with process outside the State of New York, and they were all severally enjoined from the prosecution of the Iowa suit; Blackman seems to have superficially obeyed the injunction at least so far as actively proceeding in the conduct of the litigation; the effect of that injunction was to deprive the Iowa suit of its only plaintiff, but the other defendants who appear from the testimony to be in a conspiracy to get possession of this Iowa land, and which they have agreed to distribute among themselves to the exclusion of the plaintiff in error, have attempted to evade the force and effect of the injunction by putting into the place of the then plaintiff, who had been driven into quiescence by the New York injunction, one of the co-conspirators who had entered into this arrangement to deprive Dull of the property to which he was entitled by virtue of the decree of the Supreme Court of New York, and accordingly obtained from the Iowa Court an order permitting Phelan to prosecute the suit thereafter in the name of Blackman, and the Court attempted to give to Phelan, as the successor to Blackman, rights and privileges in the Iowa suit

which Blackman himself did not have; in other words, it is claimed that new rights and new privileges sprang into existence as between the plaintiff's side and the defendant's side of the Iowa suit when Phelan became what is improperly termed in the brief on the other side "the substituted plaintiff." If he was permitted to stay in the shoes of Blackman, and prosecute the suit in the name of Blackman, he could only do so to the same extent that Blackman could have done; if Blackman was under disability Phelan succeeded to that disability.

It is true that the courts of the State of New York cannot act *in rem* to control the manner and method of the conveyance of lands in another State, but the proposition is well settled that the courts of one State can by proceeding *in personam* control a party to a suit in another jurisdiction, and that its decree will be effective is well recognized in all of the authorities to be found in the brief *contra*. A quotation from the syllabus of Burnley *vs.* Stevenson, 24 Ohio St., 474, seems to correctly state the proposition:

> "The court of equity in one State having acquired jurisdiction over the persons of all the parties, may enforce a trust, or the specific performance of a contract in relation to land situate in another State."

If it be true, as argued upon the other side, that Blackman "dropped out of the case," and for that reason there is nothing left in the case for the New York judgment to operate upon, if it has that far-reaching effect, then the entire case is out of existence. The disappearance of Blackman is found in the record on page 100, which is to the effect that on the 24th day of January, 1893, the omnipresent Duffie withdrew his appearance for the plaintiff, evidently in order that he might appear for Phelan, who was thereafter to be invested and known inthe case as Blackman. What was the effect of Duffie withdrawing his appearance? Blackman was still

left as plaintiff, in name at least; if he fully disappeared from the litigation there would have been a judgment of nonsuit, but he seems to have only gone out of the case in a pretended compliance with the injunction of the New York Court, and to transfer to Phelan the right to prosecute the suit for his and Phelan's interest, because it appears that these worthies had previously entered into a contract by which a division of the spoils was provided for in any possible outcome of the litigation under that contract; Phelan, after the title to the land should be fully established in him (p. 39), and the property appraised was to pay to said Blackman a sum which with that already paid to him should equal one-half the net sum of the appraisal of said land after deducting the amount paid Wright and others, so that Phelan as "substituted plaintiff" not only represented himself, but prosecuted the litigation for *the joint benefit of himself and Blackman*, this was both a direct and an indirect violation of the New York injunction. Had there been no injunction and had the case proceeded with Blackman upon the one side and Phelan upon the other and the other defendants, it would have made no difference whether Phelan prevailed or Blackman prevailed, for by their agreement they provided for the same and a satisfactory division of the plunder in either event, the only question ever at issue between Blackman and Phelan being how after having deprived Dull of his costly building in New York which they enabled his landlord to take from him, they should arrange for a division among themselves of the land which Dull had conveyed to Blackman without consideration.

If these parties are able to have the title "quieted in Phelan," as the decision of the Supreme Court of Iowa naively says, it will result in Dull's losing, through the confessed fraud of Blackman and the conveyance to Phelan upon an expenditure of only seventy-five dollars ($75), the land he conveyed him and without having received the least consideration.

In 1889 Dull owned a valuable building in New York and 550 acres of land in Iowa; and he entered into negotiations with Blackman in an attempt to save the New York building from the rapacity of his landlord, Blackman, Phelan and it now appears Duffie have for the past five years been under contract with each other as to how they should divide the land in Iowa which Blackman had swindled Dull out of, a division which could not be made if proper consideration had been given by the Iowa Court to the final judgment of the New York Court.

It is perfectly evident that Blackman, at the very outset of his negotiations with Dull, expected to defraud him out of the land, because he was willing to give up so large a part of what he had received for so small a consideration to those who joined with him in the adventure. Blackman had an interest which was of sufficient value to some one, so that Lyon (Dull's landlord) gave him ten thousand dollars ($10,000) for it. This interest was of sufficient value so that an honest and well-intentioned owner would not have been willing to give away a large portion of the consideration received therefor to outside volunteers, who paid little or no consideration therefor unless he had some sinister motive in so doing.

Blackman took in Duffie and Phelan as partners to divide up this consideration, which was presumably worth at least ten thousand dollars ($10,000), and the proof clearly shows was worth nearly thirty thousand dollars ($30,000), one on the payment of seventy-five dollars ($75), the other in payment of a certain bill for professional services of a very hazy nature and certainly of very small actual honest value, services which were probably rendered, if at all, to enable Blackman the better to carry out his fraudulent schemes against the plaintiff in error.

## ARGUMENT.

### I.

*As to the jurisdiction of the Supreme Court of Westchester County, New York, to hear and determine the controversy.*

Blackman was personally served in New York, appeared and defended the action, and there can be no question but that the Court had jurisdiction of the person to hear and determine the controversy before it, as to him.

The only remaining question is the right of the Court to assume jurisdiction of the subject-matter of the action by reason of the lands in controversy being without the boundaries of the State of New York, and situated in the State of Iowa.

The action sought *a cancellation of the conveyance of the Iowa lands made by Dull to Blackman on the ground of misrepresentation and fraud.* The answer resisted the cancellation by general denial and set up various defenses.

See Abstract, 76-81; Transcript, 43 to 46 and 99-106; Transcript, 56 to 60.

In *Massie* vs. *Watts*, 6th Cranch, 148, an action was brought in the United States Circuit Court of Kentucky for the purpose of enforcing a conveyance of lands in the State of Ohio. Among other defenses, it was claimed that the Kentucky Court had no jurisdiction by reason of the lands being located in Ohio. The action was based on the wrongful location by the defendant of certain land warrants on lands within the State of Ohio. It was claimed that the location should have been made in plaintiff's name instead of the defendant's, and a reconveyance of the lands to the plaintiff was prayed.

Chief Justice Marshall, in giving the opinion of the Court upholding the jurisdiction, among other things said:

> "The defendant, if liable, is liable either under his contract, or as a trustee. * * * It appears to the Court to be a species of *malafides* which will in equity convert the party into a trustee for the party originally entitled to the land. Either in consequence of contract or as trustee, or as holder of the legal title acquired by any species of *malafides* practiced on the plaintiff, the principles of equity give the Court jurisdiction, wherever the person may be; and the circumstance that a question of title may be involved in the inquiry, or may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction. *The Court is of the opinion* that in case of fraud of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person may be found, *although lands not within the jurisdiction of the Court may be affected by the decree.*"

This case was followed in

*Burnley* vs. *Stevenson*, 24th Ohio St., 474; also in

*Gilliland* v. *McQuarry* 89*th Ky.*, 434; and

Gilliland *vs.* Inabnit *et al* ., 60th N. W. Rep., 211.

The law of the jurisdiction of courts of equity where the lands affected are without the jurisdiction of the State is summed up in the elaborate notes of Hare and Wallace in the case of *Penn* vs. *Lord Baltimore* in "Third Leading Cases in Equity," beginning on page 491:

> "Rights growing out of a trust or contract, or founded upon the principles of equity as between man and man, are purely personal, and are consequently to be upheld and enforced both by law and equity wherever juris-

diction has been acquired over the parties, without regard to the nature or situation of the property in which the controversy has its origin, and *even when the relief sought consists of a decree for the conveyance of lands which lie beyond the reach of the authority of the Court, and can only be reached through exercise of its powers over the person*" (p. 498).

See also

*Dunlap* vs. *Byers*, 67th N. W. Rep., 1067.

*Wood* vs. *Warner*, 6th Am. Law Reports, 570.

*Mitchell* vs. *Bunch*, 2d Page, 606.

*Phelps* vs. *McDonald*, 99 U. S., 298.

Lewis *vs.* Porlings, 16 Howard, 1.

McGregor *vs.* McGregor, 9 Iowa, 65.

Freeman on Judgments, 4th Ed., Sec. 572.

We submit that under the foregoing authorities, the fact that the land was without the boundaries of the State of New York did not divest the Supreme Court of Westchester County of jurisdiction to hear and determine the case, and, having jurisdiction of the person and of the subject-matter, all the matters and facts at issue therein are *res adjudicata*, and the decree is entitled to the same faith and credit in the State of Iowa as in the State of New York, where rendered.

## II.

*As to the effect of the judgment of the Supreme Court of New York when plead as a defense to the suit of Blackman* vs. *Dull, in the State of Iowa.*

This decree, together with the evidence, pleadings, special findings of fact and conclusions of law, are

all set out in full on pages (Transcript, 42 to 67) 83 to 118, inclusive, of the abstract.

It will be noted that in addition to cancelling the conveyance of Dull to Blackman, *the New York Court ordered and directed Blackman to reconvey the Iowa land to Dull by good and sufficient deed, reciting the special findings of fact and conclusions of law, and the decree* (Abst., 116).

It was contended on the trial, and this was in effect the holding of the Iowa Court, that the New York decree had no extra territorial effect. That when *Blackman* transferred the litigation from the State of New York to the State of Iowa, and as plaintiff in the Iowa suit, together with his *alter ego*, Phelan, intervenor, against Dull, sought to render nugatory and void the effect of the New York decree against him, and to hold the land and the valuable rentals in absolute defiance of the findings and orders of the New York decree, that the courts of Iowa were powerless to afford Dull any relief.

This surely cannot be the law. It is a conception of the powers of a court of equity entirely at variance with its prestige and traditions, and which would limit its remedial and beneficent powers to the harsh and unyielding rules of the common law for relief, against which it owes its very origin and existence. Our contention is that when plead as a defense to the action brought in a court of equity in the State of Iowa by Blackman *vs.* Dull the decree of the Supreme Court of New York operated as a conveyance of whatever legal or equitable interests Blackman had in the land, the same as though the conveyance ordered had in fact been duly executed by him.

The parties were in a court of conscience, whose maxim, "Equity regards that as done which ought to be done," is the very foundation of its jurisdiction.

Equity regarding the substance, and not mere

form, considers things *directed or agreed to be done as having been actually performed.*

Opinion by Justice Washington in Craig *v.* Leslie, Third Wheaton, 563.
Pomeroy's Equity, Sec. 365, note I.
Also Pomeroy's Equity, Secs. 363 to 377.

By virtue of the New York decree it became as much the solemn duty of Blackman in a court of equity in Iowa to transfer his interest in the Iowa land to Dull as though a solemn agreement to do so had been executed under his hand and seal.

An oral agreement to release a mortgage is in equity the same as an absolute release.

> "A release of record would have been of no importance; that at best would have been mere evidence of a discharge which in equity had already taken place. Equity considers that as done which ought to be done."
>
> Huff *vs.* Farrell, 67th Is., 298.

Where a decree of a court of equity decreeing specific performance of a contract as to land in one State is filed in another, the party is entitled, on the filing of the decree, to specific performance.

Brown *vs.* Desmond, 100 Mass., 267.
Pingree *vs.* Coffin, 12th Gray, 304.

To the same effect was the holding of the Supreme Court of Ohio in

*Burnley* vs. *Stevenson*, 24th Ohio St., 474.

In this case one Scott employed a surveyor, Evans, to locate lands in Ohio, and agreed to convey to him a portion of the lands so located for his services. Evans having performed the contract, United States patents were duly issued to Scott, who failed to reconvey to Evans, as agreed, for his services. Scott died without conveying the lands to

Evans as agreed, and Evans filed his bill in chancery in the State of Kentucky against the heirs and representatives of Scott, claiming a specific performance of the contract as against them.

They were personally served, and on the hearing the Kentucky Court granted the relief prayed and ordered them to convey; which was never done. The plaintiff, claiming title under the heirs of Scott, brought an action in the Court of Common Pleas of Ohio for the possession and ownership of the land, and the defendants, as grantees of Evans, set up the decree in equity in the Circuit Court of Kentucky, ordering the heirs of Scott to convey, being simply a decree *in personam*. There was judgment for the defendants, and, on appeal, the Supreme Court of Ohio affirmed it, and, among other things, held:

That although the decree was *in personam*, and was merely a trust in favor of Evans, the fact that the conveyance was not made in pursuance of the order did not in any way or manner affect the validity of the decree in so far as to determine the equitable rights of the parties to the land in controversy, and that all parties thereto, and those claiming under them, were absolutely bound by it; and that it was an absolute defense to the action, and cited the provisions of the Constitution of the United States as to full faith and credit being given in each State to the records and judicial proceedings of every other State.

The Kentucky Court, in default of the defendants complying with the order of conveyance, had ordered a commissioner to execute the same, and this conveyance by the commissioner was held to be wholly inoperative and void, and could not be considered as passing title to the Ohio land. This seems to have been one of the objections of the Iowa Court to the New York decree, that it did not order a commissioner to make a conveyance in default of Blackman (see Opinion, Record, 132).

This objection is fully met by this decision, and

its decree is based wholly on the simple order and decree of the Kentucky Court.

Among other things, the Ohio Court, in its opinion, says:

> "When a decree rendered by the court of a sister State having jurisdiction of the parties and of the subject matter is offered as evidence, or pleaded as the foundation of a right in any action in the courts of this State, it is entitled to the same force and effect which it had in the State where it was pronounced. That this decree had the effect in Kentucky of determining the equities of the parties to the land in this State, we have already shown, and the courts of this State must accord it the same effect. True, the courts of this State cannot enforce the performance of the decree by compelling a conveyance through its process of attachment, but when pleaded in our courts as a cause of action, or as a ground of defense, *it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein unless it be impeached for fraud.*"

This rule in equity was indirectly referred to by this Court in

*Carpenter* vs. *Strange*, 141 U. S., 87.

A writ of error to the Supreme Court of the State of Tennessee was under consideration, involving the effect of a decree of the Supreme Court of the State of New York.

Among other things the New York Court simply decreed that a certain deed of conveyance of real estate in the State of Tennessee was null and void, without any order or direction as against the parties.

Chief Justice Fuller, in the opinion reversing the case, while holding that in all other respects the New York decree and its findings were binding on the courts of Tennessee, yet as to that portion thereof cancelling and annulling the deed of convey-

ance to the land in Tennessee it was not binding, and among other reasons, because:

> "*No conveyance was directed nor was there any attempt in any way to exert control over her in view of the conclusion that the Court announced.* Direct action upon the real estate was certainly not within the power of the Court, and *as it did not order Mrs. Strange to take any action with reference to it*, and she took none, the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee."

The only inference from the foregoing authority is that *if the Court had ordered Mrs. Strange to make the conveyance, that such order would have been binding and effectual upon the courts of Tennessee.*

From the foregoing authorities we submit that on the plainest principles of equity *the decree of the Supreme Court of New York, when plead as a defense in the courts of Iowa, operated as an absolute conveyance of whatever interest Blackman may have had in the premises, the same as if the order made in the New York decree had been actually executed.* And in refusing to give to the New York decree this force and effect the Iowa Supreme Court refused to give to it the full faith and credit required by the Constitution.

## III.

***The Supreme Court of New York having jurisdiction of the person and of the subject matter, it must follow that its decree operated in a court of equity to divest Blackman of whatever interest, equitable or otherwise, he had in the land.***

The Supreme Court of Iowa, in its opinion (Abst., 127 to 136), held that Blackman at the time of the rendition of the New York decree had divested himself of all interest in the land.

This finding is in direct conflict with the instrument under which it is claimed the title was divested.

The contract of October 6, 1892, between him and Phelan (Abst., 68–71; Transcript, 38 to 40) is the only instrument to be considered as determining the conveyance of the interest of Blackman.

The conveyance of the preceding January is conceded both in the pleadings in this case and in Blackman's answer in the Supreme Court of New York and in the evidence (Abst., 64; Trans., 36) to have been merely a mortgage to secure the payment of $75, and although in the form of a deed in a court of chancery, it must be regarded in its true character of a lien to secure this paltry sum.

The remarkable contract of October 6, 1892 (Abst., 68–71), shows that *Phelan was simply the trustee and agent of Blackman to hold the land for the payment of Blackman's debts to the amount of about* $3,000, *and that the remainder of the land or its proceeds was to be divided equally between them.*

In other words, *for the execution of a fraudulent trust Phelan is to have the half remaining after the payment of certain debts of the impecunious Blackman, and the other half is to be paid to Blackman!*

Conceding for the present to Phelan the interest

reserved under this remarkable contract, the beneficial interest of Blackman in the property was the amount of his debts to be paid, and the one-half interest remaining thereafter.

In round numbers, as shown by the evidence, Blackman's financial interest is as follows:

| | | |
|---|---|---|
| Total value of land, 551 acres | | $24,800 00 |
| Rental value of land for 5 years | | 8,200 00 |
| Total value of property | | $33,000 00 |
| Claim of salvage to be paid by Phelan as per contract | $1,000 00 | |
| Claim of Duffie to be paid as per contract | 1,000 00 | |
| | | 2,000 00 |
| Balance to be divided between Phelan and Blackman | | $31,000 00 |

Blackman's share in the property being $15,500, to which should be added his indebtedness of $2,000, making *a grand total of* $17,500 *as the beneficial interest of Blackman in the property, as shown by the contract of October* 6, 1892, *and which we claim was divested by virtue of the decree of the Supreme Court of New York.*

Had this contract provided that the entire proceeds of the land should be handed over to Blackman, there could be no question in a court of equity as to who was the owner; we can see no distinction between this case and one where the party is the sole and entire beneficiary of the proceeds of the property.

Where land is conveyed to a trustee for disposition, the *cestui que trust* is in equity, clothed with the ownership of the property.

Pomeroy's Equity, Sec. 374.

Where land is directed to be sold and turned into money, equity will regard the land as money, or the

money as land, as it may be necessary to carry out its purposes.

Pomeroy's Equity, Sec. 371.

It makes no difference that the defendant is only the equitable owner of the land outside of the jurisdiction; a court of equity having regard for the substantial rights of the parties will treat him as the true owner.

Baker *vs.* Rockwood, 118th Ills., 365.

It certainly is trifling with the powers of a court of equity to permit Blackman's interests in the land to escape the force and effect of the New York decree because Blackman merely made Shelton his agent to convert the property into money for him.

For all purposes, we submit that the interest of Blackman in and to the Iowa land at the time of the rendition of the New York decree, as shown by the contract of October 6, 1892, was divested, and in refusing to recognize this interest, or grant any relief to complainant, the courts of Iowa refused to give to the decree of the Supreme Court of New York that faith and credit guaranteed by the Federal Constitution.

## IV.

*The decree of the Supreme Court of New York bound not only Blackman's interest in the land, as shown by the contract of Oct. 6, 1892, but the entire interest of Phelan and Duffie as well, for the reason that on the pleadings it was admitted that Phelan and Duffie were purchasers without the payment of any value and with full notice of the fraud.*

In the answer of Blackman to the petition of Dull in the Supreme Court of New York, he alleges

under oath (Abst. 104, par. 10) that *Phelan bought the land and paid therefor by agreeing to pay certain debts then due and owing by him to Duffie and Savage, and by agreeing to pay the balance of the purchase price, &c.* * * *

The allegations in the *cross-petition of Dull and wife* are set out on page 28 (Abstract, pars. 8 and 9), and *charge explicitly that whatever interest Phelan and Duffie or Wright acquired in and to the property by virtue of the instruments under which they claim, was wholly without consideration, and that they had actual notice of the fraud which had been perpetrated on the complainant Dull at the time of such purchase. To these affirmative allegations there is absolutely no denial.* Search all the pleadings of Phelan and Duffie, which are set out complete in the Abstract, 1-49 inclusive, and *there is no denial of this vital charge, nor is there any affirmative allegation in their petition that they were either of them purchasers for value without notice* (see pleadings of Duffie and Phelan, Abst., 1 to 50.)

It is not necessary to consider the pleadings of the defendant Wright in this particular, as his interests were cut off by the Iowa Court, and as he did not appeal, the decree is final as to him.

The pleadings referred to were the sole pleadings in issue which were before the Iowa Court, and on which its decree was based.

The fraud of his grantor being established by the decree, the burden was on Phelan, not only to allege but to prove that he was a *bona fide* purchaser for value.

Rush *vs.* Mitchell, 71 Ia., 333.

The case presents a similar condition of the record to that in

Cooley *vs.* Scarlett, 87th Am. Dec., 298.

In this case, an action was pending in the courts of Illinois to set aside and cancel the conveyance of

certain lands in the State of Michigan. The fraudulent grantees of the Michigan property were before the Court, just as in the case at bar they were before the Iowa Court. In the closing part of the opinion occurs the following:

> "There is no attempt to prove that Ritter and Perrin were purchasers for a valuable consideration, and they do not even claim to be in their answers, which are sworn to. Being thus personally within the jurisdiction of the Court, it can compel them personally to execute to Scarlett a release of all claims acquired through the deed from him."
>
> See also Caldwell *vs.* Carrington, 9 Peters, 98.

All the allegations of a bill not denied by plea or answer, stand admitted.

> Bogardus *vs.* Trinity Church, 4 Paige, 178.
>
> Zorley *vs.* Kittson, 120 U. S., 303.

> "Whenever the legal title of property is obtained under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same. And *a court of equity has jurisdiction to reach that property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until the purchaser of it in good faith and without notice acquires a higher right*, and takes the property relieved from the trust."
>
> Pomeroy's Equity, Sec. 1055.
>
> Moore *vs.* Crawford, 130th U. S., 122.
>
> Perry on Trusts, Sec. 166.
>
> Russ *vs.* Mebius, 16th Cal., 350.
>
> Pomeroy's Equity, Secs. 1044, 1047.

It stood solemnly admitted by Phelan and Duffie upon the record, that *they acquired their interests*

*without any consideration and with full notice of this fraud.*

We respectfully submit that, on the pleadings in the case, the claims of Phelan and Duffie should have been disregarded, and the rights of Dull under the New York decree enforced as against them, and that in refusing to do so, full faith and credit was not given by the Iowa court to the records and proceedings of the Supreme Court of New York, as required by the Constitution.

## V.

*The judgment of the Supreme Court of New York bound not only the beneficial interest of Blackman under the contract, but the entire property, by reason of the fact that Phelan and Duffie purchased only an equitable interest in the property and they must abide the title of their grantor.*

At the time of their claimed acquirement of the interest in the land, October 6, 1892, the legal title was in Wright, and on September 9, 1892, before their purchase, he had filed a cross-petition against Blackman, praying that he be decreed to be the absolute owner of the property under and by virtue of the conveyance to him by Blackman (Abst., 20-22).

The purchase by Phelan and Duffie of Blackman's interest in the land was simply a purchase of the equitable interest, *subject expressly to the litigation with Dull.*

"The purchaser of an equitable title must always abide by the case of the person from whom he buys."

Boone *vs.* Chiles, 10th Peters, 177.
Trustee *vs.* Wheeler, 61 N. Y., 88.
Hallett *vs.* Collins, 10th How. (U. S.), 174.

**The purchaser of an equitable title in land takes only such interest in the property as his grantor had at the time of the purchase.**

American Mfg. Co. Limited *v.* Hopper, Vol. 29, U. S. Appeals, page 24, Citing.

Caldwell *vs.* Carrington, 9 Peters, 98.

Shiras *v.* Craig, 7th Cranch, 34.

Vattier *v.* Hinch, 7th Peters, 252.

Boone *vs.* Chiles, 10th Peters, 177, *supra.*

See also

Pomeroy's Equity and authorities cited, Sections 658 and 761.

Numerous additional authorities might be cited, but these are sufficient to show the elementary character of the rule. This being so, Phelan and Duffie were in no position to set up their *bona fides* even if plead and proven against the enforcement of the New York decree, and were bound by its terms as absolutely as their grantor, Blackman, and must abide his case.

We submit that by reason of Phalan and Duffie being simply purchasers of the equitable interest, and *the title not being in Blackman at the time of the purchase*, they acquired no interests which could be successfully asserted against the equities of Dull, and in refusing to make effective the New York decree against them, the Iowa courts failed to give to that decree the faith and credit to which it was entitled under the Constitution.

## VI.

*The judgment of the Supreme Court of New York bound not only the beneficial interest of Blackman, but the entire property, for the reason that the contract of October 6, 1892, is in effect but a quitclaim deed.*

It is elementary law that one purchasing land under a quitclaim deed is not a *bona fide* purchaser for value, and takes it subject to all equities.

An instrument conveying real property is a quitclaim when it conveys merely the grantor's title and interest in the property.

Wighton *v.* Spofford, 56th Ia., 145.

A grantee under a quitclaim acquires no rights as against outstanding equities, which are valid against his grantor.

Postel *v.* Palmer, 71 Ia., 157.
Rush *v.* Mitchell, 71 Ia., 333.
Steel *v.* Sioux Valley Bank, 79 Ia., 339.

A purchaser by quitclaim deed for an amount much less than the actual value of the property is not protected as a *bona fide* purchaser. Neither is the purchaser from him thus protected who has knowledge of the nature and consideration of the deed under which his grantor holds.

Hume *v.* Franzen, 73 Ia., 25.

The title and ownership of the property was acquired by Phelan, if at all, under the contract of October 6, 1892. Prior to that as is admitted, he was a mortgagee; he had a lien upon the property for $75, but between him and Blackman the title and ownership was in the latter.

Chair *v.* Abbott, 30th Ia., 158.
McHenry *v.* Cooper, 27th Ia., 137.

The contract did not have the effect to change or enlarge the grant of the mortgage, but operated to change the relations and rights of the parties with reference to the property. By *its* terms and *by them alone*, Phelan, who had formerly held a lien upon the property, acquired the title ownership of it. Upon the plainest principles, this must be so, for when we look for the origin and evidence of Phelan's title we must go to that contract alone, for back of it he had neither title nor ownership, and necessarily, whatever of right he now holds other than the lien created by the mortgage, was created by the contract. It seems to us that no ingenuity of argument can avoid this result.

What then is the nature and effect of the contract as a conveyance of the property? Clearly it is a mere relinquishment by Blackman to Phelan of whatever right or interest he then held in it subject to the litigation. Those are its terms, and that is its effect, and the law impresses no other character upon it. It contains no assurance of title or other covenants, nor does it make the slightest reference to those contained in the mortgage. Any stipulation in an instrument which was evidently intended by the parties to operate as a conveyance, will be given that effect; but *a covenant of warranty can be created only by express terms.*

Phelan, then, is in the position of one holding under a quitclaim deed. By no ingenuity can he be put in any other or better position than that. If he were to sue for a breach of the covenants contained in the mortgage, the measure of his recovery would be the $75 paid by him as consideration for those covenants, and he has no others. The stipulation in the contract that the mortgage should become an absolute conveyance did not, as we contend, have the effect to enlarge the scope or power of that instrument, but it operated *propia vigore* to transfer the title, and as it contains no reference to the covenants in the mortgage, it is impossible that they

should attach to or become a part of the conveyance.

We invite the closest scrutiny of the contract, for we are confident that our interpretation of it is correct. We need not cite authorities to show that one holding under a quit claim or other conveyance having only the force and effect of a quit claim is not an innocent purchaser of the property, but takes only such interest as his grantor had, subject to any equity which was good as against the grantor.

We submit that for these reasons the Courts of Iowa failed to give to the decree of the Supreme Court of New York the full faith and credit to which it was entitled under the Constitution.

## VII.

*The decree of the Supreme Court of New York bound not only Blackman's beneficial interest in the land under the contract of October 6, 1892, but the entire property as well, for the reason that not only was it admitted in the pleadings, but it was admitted and shown by the evidence that neither Phelan nor Duffie paid any value, and whatever interest they acquired was taken with full knowledge of the equities of Dull.*

As before contended (Par. III.) in cases of fraud a court of equity has power to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder without limitation until a purchaser for value without notice of the fraud is found.

Pomeroy's Equity, Secs. 1044 and 1055.
Moore *vs.* Crawford, 130 U. S., 122.

In other words, we claim that a court of equity will disregard mere forms of speech or writing and

grasp the very right of the transaction, and will follow the title through all the devious mazes of fraudulent dealings until it has found one who has paid value for the land without notice of the fraud. This is the only barrier which can be successfully interposed to the powers of a court of equity.

The fraud of Blackman having been established by the decree, it was incumbent on Blackman not only to allege, but prove by a preponderance of the evidence that he was a good faith purchaser for value.

Rush *vs.* Mitchell, 71 Iowa, 333.

Is this man Phelan, to whom the Iowa court has given this valuable property, an innocent purchaser for value?

Is he the adamantine rock of innocence which stands as a barrier to the exercise of the remedial powers of a court of equity?

We respectfully submit that, from the record, these questions must be answered emphatically in the negative.

(1st.) He was charged with full knowledge of the fraud. He admits that he never saw the land or made any inquiry as to its value or as to the title (Abst., 62-63; Tr., 35). That he took the land at Duffie's request as a speculation (Abst., 63 and 162; Tr., 35 and 92). That *Duffie was his attorney and agent on whom he implicitly relied as to title and value and everything in connection with the land,* and although he lived in the City of Omaha, within 15 miles of the land, he never inspected it or made any personal inquiry in regard to it.

*Duffie was his trusted agent in the whole series of transactions by which he claims to have acquired title* (Abst., 63-66; Tr., 35 to 37).

This being so, *whatever knowledge Duffie pos-*

*sessed as to the equitable rights of Dull would be imputed to Phelan.*

See

Shoemaker *vs.* Smith, 80th Ia., 655.
Crum *vs.* Davis, 54th Ia., 25.

"In the purchase of land the principal is affected by the previously acquired knowledge of his agent, if the agent had that knowledge in mind at the time of making the purchase."

Brown *v.* Cranberry Iron & Coal Co., Vol. 25, U. S. Appeals, 679.

"If the agent, at the time of effecting a purchase, has knowledge of any prior lien or trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby."

Distilled Spirits, 11th Wallace, 356.

The deed of Dull to his wife (Abst., 50) was filed September 22, 1892, almost two weeks before the contract of October 6, 1892, was executed, and charged the uncle with notice that Dull still claimed to own the land.

In February, 1892, at the Chicago meeting long before the contract of October 6, 1892, was entered into, Duffie was fully advised as to the nature and extent of the claim asserted by Dull to the land. He admits in his testimony that at this meeting Dull advised him fully as to the fraud of Blackman perpetrated upon him (Abst., 126-139; Tr., 72 to 79). That he characterized the transaction at that time as "high swindling," and told Blackman that he ought to give Dull back his land and pay him for all damages he had sustained by reason of the fraud (Abst., 158-160; Tr., 90 and 91).

The evidence of Dull and Burdick as to what was said and done at the Chicago meeting, in the presence of Duffie (Abst., 126-138 and 126 and 140; Tr., 72 to 79) is wholly uncontradicted. The whole New York fraud, in all its hideousness, was gone over. Black-

man was tearfully repentant, and just as soon as he could wrest the title from Wright in the suit he had just begun, he would reconvey the land to Dull. This agreement was never abrogated, and Duffie, without further light or inquiry, procured thereafter the execution of the contract on which Phelan's title and his is based (Abst., 161-162; Tr., 91 and 92), which provided that Phelan was to carry on the litigation against Dull and Wright.

There can be no question, from the evidence, but that Duffie and Phelan entered into the arrangement with Blackman with full knowledge of the fraud, and with the set design and purpose of beating Dull out of his land.

No more cunning act of duplicity is shown in the record than the fact that while in Chicago, in February, 1892, Blackman was shedding crocodile tears of repentance and promising to convey to Dull the Iowa land and make full reparation for the New York fraud, with Duffie present as his attorney, they, Blackman and Duffie, as attorney in fact for Blackman's wife, had already but a few days before (Jan. 30, 1892, see Abstract, 50; Tr., 28) signed and delivered what purported on its face to be an absolute conveyance of the property to Phelan.

All this was studiously concealed from Dull, and yet, in the face of the undisputed record, that he only a week before had signed Mrs. Blackman's name to the deed as attorney in fact, Duffie swears, on his oath on the trial, that he did not know that Blackman had given Phelan a mortgage or a deed until he and Blackman went to the train to go home after parting from Dull (Abst., 160; Tr., 91).

And this same Duffie, in his sworn answer (Abst., 44; Tr., 24 and 25), goes with great particularity into the details of the alleged settlement at Chicago —then, as a witness on the stand (Abst., 160; Tr., 91), he coolly swears that Blackman and Dull "did not tell him the details of any settlement," and subsequently when the contract of October 6, 1892, was made, he never asked Blackman whether any

settlement had been made between him and Dull. although he admitted that no communication had been had between them on the matter since the Chicago interview (see Abst., 161; Tr., 91).

In verifying the amendment to Blackman's petition, October 13, 1892, Duffie swears in substance *that Blackman was then the owner of the Iowa land, when only a month before*, September 17, in verifying Phelan's petition in intervention *he had sworn that Phelan was the absolute owner.*

When his attention was called to these facts on cross-examination, he had to admit that he could not explain his conduct (Abst., 161; Tr., 91).

No wonder that Duffie sums up his remarkable record as a witness in the case with the candid statement: "It seems more like a dream to me; I don't want to testify positively about it" (Abst., 162; Tr., 92).

A court of equity, where the sacred rights of property are concerned, surely does not formulate its decrees on dreams, and the theories of dreamers, and we submit that, on the record, this man Duffie and his puppet Phelan should not for one instant be permitted to hold up their flimsy pretentions as a shield against the enforcement of the decrees of a court of equity.

(2.) Not only did Phelan and Duffie have actual notice of the fraud, but *they paid no value.*

It is elementary law that to constitute a *bona fide* purchaser he must have obtained the property not only without notice, but *must have paid value.*

> "Actual payment of money is necessary to the character of a *bona fide* purchaser for value. The giving of security and executing a note is insufficient."
>
> Kittredge *v.* Chapman, 36th Ia., 348.

January 30, 1892, Phelan claims to have paid Blackman $75 for a deed of the property, which was

merely as mortgage security (Abst., 58; Tr., 32). This is the only payment made direct. He claims to have made other payments to Duffie on attorney's fees and other matters, but cannot tell what ones were to apply on the land deal, and what on Duffie's fees (Abst., 65-66; Tr., 36 and 37).

Duffie himself is wholly at sea on the question of payments. Outside of the claimed payment after summons in the New York suit of a copy of Dull's complaint and order of injunction had been served on them, December 24, 1893 (T., 42), outside of the $75 paid January 30, 1892, no other payment is shown to have been made by Phelan but $75, in return for $25,000 consideration.

By the contract of October 6, 1892, Phelan merely undertook to pay the indebtedness of Blackman to Duffie and Savage out of the proceeds of the property, in case he got it at the end of the litigation, of which he was apprised, and which was then in contemplation, and to account to Blackman for one-half of the residue.

All of these undertakings were executory, revocable, and none of them have ever been performed. Agreements such as these do not entitle the parties to protection as holders for value.

See Pomeroy's Equity, Sec. 751.

> "A pre-existing debt is not a consideration which will support a *bona fide* purchaser."
> Phelps *v.* Fockler, 61 Ia., 340.

The debts referred to in the contract were all of prior existence and long standing.

> "An innocent purchaser will be protected only to the extent of partial payments made."
> Merrill *v.* Tobin, 82 Ia., 535.

If Phelan had paid anything, under this decision he should have been allowed a lien to the extent of his innocent investment in the transaction instead of being given the entire property.

But he paid nothing. The only consideration was his undertaking to pay certain debts of his dependent Blackman, not one of which he has ever paid; and by the subsequent contract (Abst., 180; Tr., 102), his liability to pay them at all is made to depend upon his ability to cheat Dull out of the land.

His hands are unclean; he was in a court of conscience, seeking by its decrees to gather the fruit of frauds, of which he had notice, both actual and constructive. He paid no consideration, and was under no obligation to pay any unless he should succeed in consummating the frauds of his grantor.

We respectfully submit that the Supreme Court of Iowa, in recognizing that Phelan and Duffie had any rights as against the enforcement of the New York decree, failed to give to the decree of the Supreme Court of New York that full faith and credit to which it was entitled under the Constitution.

## VIII.

*It will be noted that the opinion of the Iowa Supreme Court closes with the following declaration:*

> " The decree therefore of the District Court is in all respects affirmed."

This decree which thus becomes final in Iowa against our clients, is set out in full on pages 185–190 abstract (Tr., 105 to 108).

This decree is not based on any findings as to the *bona fides* of Phelan and Duffie; it defeats the claim of Wright, and gives to Phelan the entire property, and this finding is based solely on the grounds that:

(1.) Dull did not offer to return the mortgage or deed of the New York property.

(2.) Acquiescence in the fraud which Blackman had practiced upon him.

Whatever constitutional rights Dull may have had under the proceedings of the Supreme Court of New York are utterly ignored and held unworthy even of reference.

That these questions of fraud and laches and tender were adjudicated and determined by the New York decree there cannot be the slightest doubt.

The question of the failure to return the deed and mortgage was expressly in issue (Abst., 96-105; Tr., 54 to 60). The doctrine of acquiescence and laches was embraced therein in the general issue; also the question that Dull had conveyed the lands to his wife. (This latter defense, which the Iowa Supreme Court in its opinion refers to as rendering void the New York decree, is fully explained by the testimony of Dull (Abst., 87; Tr., 49). that this conveyance was simply for the purpose of giving notice to the world that he stillasserted ownership of the land; as between himself and wife, by a contract of reconveyance between them, he was the owner of the land, entitled to maintain an action, and both he and Mrs. Dull were in the Iowa court, the one asserting and the other assenting to this proposition, and no other person was entitled to gainsay or deny the existence of such facts of title.)

Not only were these matters in issue and adjucated, but *all other matters which might have been plead as a defense thereto were settled and adjudicated in favor of Dull.*

> " An adjudication is final and conclusive not only as to matters actually determined but as to every matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the

original action, both with respect to matters of claim and of defense."

Freeman on Judgments, Sec. 249.
Dewey *v.* Peck, 33 Ia., 242.
Lawrence *v.* Stevens, 46th Ia., 429.
Maloney *v.* Horran, 49th N. Y., 115.
Cromwell *v.* County of Sac., 94 U. S., 351.
Case *v.* Beauregard, 101 U. S., 688.

"A judgment and decree affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court."

Freeman on Judgments, Sec. 249.

This decree of the District Court, which is the finality of the opinion of the Supreme Court of Iowa, surely fails, under the authorities cited, to give any faith or credit whatever to the decision of the Supreme Court of New York, and is in violation of the constitutional rights of plaintiffs in error.

## IX.

A careful examination of all the authorities cited in the brief filed in favor of the motion to dismiss the appeal herein, on the ground that there were other questions involved in this case besides the Federal question, which were of themselves sufficient to control the decision and thereby oust the jurisdiction of this Court in this case, shows that all such cases were entirely different in fact from the case at bar. In this case it is very clear that each and all of the questions adjudicated were passed

upon and controlled by the decision in the New York Supreme Court, and were interwoven therewith.

## X.

The statement on page 11 of the brief, contra-criticising the action of the plaintiff in this case, in that he sought to have his day in court on certain issues, &c., is easily answered by the statement and proposition that he had a perfect right when he appeared in the Iowa court to plead the New York proceedings in abatement, and that being overruled he could, without injury to the right he had thereby reserved out of abundant caution, present as many distinct and independent defenses as he desired, without bringing the case within the principle of Federal law relied upon by the defendants in error.

When he reserved his rights he was entitled to have the benefit of them, and he did not in any way waive them by going into a further trial of the merits of the case, and this Court will certainly accord to him the full protection afforded by the Federal law.

## XI.

*The attorneys of record in the case in the United States Supreme Court having appeared and accepted service for all the defendants, among whom was named John E. Blackman, there can be no doubt that he is a party to this action, bound by the decision of the Court which may be made herein, which decision also will bind and affect all the other parties defendant who claim through him either directly or indirectly.*

The doctrine is too well established in all parts of the United States to need any extended argument to show that when attorneys appear or accept service for a party, the Court will presume that they had full authority so to appear or accept service and the party will be bound by their action in the suit.

A few authorities establishing this doctrine beyond question are as follows:

Hamilton *vs.* Wright, 37 N. Y., 502.
Davis *vs.* Bowe, 118 N. Y., 55, at page 61.
Vilas *vs.* R. R. Co., 123 N. Y., 440.
Marling *v.* Roberts, 13 W. Va., 440.
Ingram *v.* Richardson, 2 La. Ann., 839.
Hendrix *v.* Cathron, 71 Ga., 742.

## XII.

The injunction which was granted in New York made it utterly impossible for Blackman or his co-conspirators, who were really simply himself in another form, to proceed with the action at all. Of course they could do so as a matter of physical fact and have done so as voluminous papers in the record amply show, but his acts and their acts were absolutely void *ab initio* from the time that injunction was granted. Not only was Blackman liable to be punished for contempt within the State of New York by the Supreme Court for so permitting the suit to be prosecuted by his dummies in his interest but the suit itself was absolutely void; it was without a plaintiff, and it has been proceeding with only one side to it, and without any real legal existence, and the decree therein entered is absolutely void and should be so declared by the Supreme Court of the United States.

A case very similar to the one at bar is

Cunningham *vs.* Butler, 142 Mass., 47.

This was a case of injunction against suit in another State. The syllabus is as follows:

" A citizen of Massachusetts, with knowledge that " his debtor residing there had stopped payment, " and anticipating proceedings in insolvency, as- " signed his claim to a citizen of another State, " without consideration, and the latter, *before pro-* " *ceedings* in insolvency *were begun sued* upon the " claim in said other State, and attached property " of the debtor there. On a bill in equity by the " assignee in insolvency of the debtor, held, that A " should be restrained from prosecuting the action " to judgment, if A has control of the action."

In that case a citizen of the State of the forum assigned his claim to a party outside of the State in order that proceedings in the foreign State might be taken upon it in contravention of the law of the forum.

Farnsworth *vs.* Fowler, 1 Swan, 1 (Tenn.), holds both that a party is bound by injunction from the time he has notice of its issuance and also that any act in violation of the injunction being unlawful is to be deemed invalid, ineffectual and unavailable as to the purpose intended as though it had not been done. The Court said:

" As to the effect of the writ, we may observe that " it is directed to the defendant, and its action is " upon him *in personam*, and it renders it unlawful " in him to do the thing therein prohibited, or to " fail or omit to do the thing therein commanded. " The act being unlawful, it is to be deemed inef- " fectual and unavailable, as to the purpose intended, " as though it had not been done; or, if that may " not be, on account of the intervention of the " rights of innocent persons, who had no knowledge " or information of the injunction, the defendant is " liable to make indemnity for this unlawful act to " the party injured."

In the case at bar it cannot be claimed that any good faith purchasers came into the title without notice. Whatever has been done by Phelan and Duffie can be taken to be the acts of their assignor, Blackman, for they had full notice of everything and did not pay value.

## XIII.

*An injunction becomes binding upon both the defendant and his agents and other parties connected with him either directly or indirectly and all parties against whom it is directed as soon as it comes to their knowledge, even though it may not be served in exact accordance with the strict rules and provisions of law.*

Wimpy *vs.* Phinizy, 68 Georgia, 188.

The injunction was granted against the defendant, his agent, &c., restraining them from interfering with a certain house. Defendant's attorney interfered with the house, contending that he, after the injunction, had ceased to act as attorney for defendant and that his interference was in behalf of a stranger to the suit. He was held to be in contempt.

Cape May R. R. Co. *vs.* Johnson, 35 N. J. Equity, 442, notice of the granting of the injunction was given by telegraph. It was held a sufficient notice in the case, and it has also been held that all parties who act in contravention of the injunction are acting illegally and are liable to punishment whether the service upon them is fully made or not, provided they act with full knowledge.

See

Parker *vs.* Russell, 2 Lansing, 242.
Gibbs *vs.* Morgan, 39 N. J. Equity, 79.

See the following cases:

Thebau *vs.* Canova, 11 Alabama, 143.
Fowler *vs.* Farnsworth, 1 Swan (Tenn.), 1.
Cumberland Co. *vs.* Hoffman, 39 Barbour, 16.
Taylor *vs.* Hopkins, 40 Illinois, 442.
Ogden *vs.* Gibbons, 4 Johns. Chancery, 174.
Endicott *vs.* Mathis, 9 N. J. Eq., 110.

## XIV.

*We have thus presented in detail the various reasons why we contend that the rights of plaintiffs in error, under the Constitution, were disregarded by the Iowa Courts.*

The conveyance of Blackman had been adjudicated as fraudulent and void, and it was only the fleshless skeleton of a legal title left in him which was ordered to be turned over, and in any court of equity this would be decreed to have been done wherever and whenever the question should arise as to the relative rights and interests of Blackman and Dull in and to the property involved.

The fact that fraud had been established was beyond reversal, and *whatever results naturally followed from the existence of such a finding, our clients had a constitutional right to that result.*

As to Blackman, it was as if the Iowa Court had made the New York decree and in that jurisdiction; there was no longer any issue on the fraud question as between Blackman and Dull, and whatever of shadow or of substance Blackman retained in the property belonged to Dull, and was to be treated as his property. This necessarily entitled Dull to a

decree of the Iowa Court establishing in him whatever right, title or interest in the land, legal or equitable, remained unconveyed to a *bona fide* holder for value.

In any view of the case, under the contract of October, 1892, of Blackman with Phelan, a large interest still remained undisposed of and subject to such a decree after the cancellation of the Wright interest. The Wright interest was eliminated by the decree of the Iowa Court from the contract of October 6, 1892, Phelan having elected to contest the same, and Wright not having appealed, his interests are completely eliminated from the controversy.

It is not claimed that Phelan or Duffie were parties to the frauds complained of and adjudicated in the New York action, and their rights are not at all dependent upon any participation or non-participation therein, and as these frauds were confined to Blackman and had been specifically passed upon, all that was permitted to be proved on the trial of the Iowa suit on the subject of fraud, except the introduction of the New York judgment roll to show that that issue had been settled, was entirely immaterial, and all that was said on that subject by the Iowa Court was irrelevant.

As to Phelan and Duffie (Savage was not a party to the suit, had no connection therewith and the reference to him in the opinion of the Iowa Supreme Court is wholly unwarranted), the only legitimate question was, did either of them stand in relation to the Iowa land as a purchaser for value and without notice, and upon the evidence, and the law as applicable to it, as we have endeavored to show, that issue was as plain upon that question as it was upon the question of fraud, because, as shown by the Record:

(1.) The pleadings admitted that they were not purchasers for value, and that they had full notice of the fraud.

(2.) By the contract of October, 1892, they bought merely the equitable title and a lawsuit, as by its terms expressly stated.

(3.) The contract of October, 1892, was in effect a quitclaim deed and afforded them no protection against the equities of Dull.

(4.) Because the evidence, without contradiction, shows that they had actual notice of the fraud and paid no value for the interests acquired.

(5.) Because by proceeding in violation of the injunction the defendants in error have accomplished nothing in law.

It may be contended that inasmuch as the Iowa Court did not in terms overrule the New York decree, that the case was decided on other grounds than the Federal question, and so the judgment must stand.

> "The Court will look to the record, and not to the opinion, to determine whether a Federal question was decided."
>
> Gibson *v.* Chouteau, 8th Wallace, 314.

As before urged, although not overruling the New York decree in express terms, the decree of the Iowa Court at every point utterly disregarded it, and formulated its findings of fact and conclusions of law in direct opposition to and in defiance of every finding of fact and conclusion of law of the New York Court.

That a Federal question was in the case, and that the constitutional rights of our clients were disregarded, it seems to us is too plain to need argument. The Iowa Court could not have rendered the decision it did without deciding against the validity of the New York judgment.

> "The jurisdiction is maintainable if the case shows that Federal questions were in-

volved, though it also appears that there were other defenses, *if these defenses afford no legal answer to the suit.*"

Maguire *v.* Tyler, 8th Wallace, 651.

"And this is so, even though the case may have been disposed of generally by the Court on other grounds."

Minnesota *v.* Bachelder, 1st Wall., 109.

The jurisdiction of the Court existing by reason of the Federal question, the decree of the Iowa Court—

"* * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States, 'and the Supreme Court may reverse, modify or affirm the judgment or decree of such State Court, and may, at their discretion, award execution or remand the the same to the court from which it was removed by the writ.'"

See

Revised Statutes United States, Sec. 709.

Desty's Federal Procedure, 332.

This brings up for review not only the interest still retained by Blackman under the contract of October 6, 1892, but the position of Phelan and Duffie in the record and the untenableness of their position as set out in our preceding argument, the same as though a decree had been rendered in a court of equity in a Federal Court sitting in the State of Iowa.

The consideration of these matters involve merely questions of general equity law; they are not based on any statutes, either of Iowa or New York, and, the record being shown, the necessary and logical results arising therefrom must be considered by this Court in the determination of the suit.

If full faith and credit had been given to the New York judgment not only would it have required the Iowa Court to have rendered a decree in favor of our clients for more than half of the property by reason of the interest retained under the October contract, but also as against the flimsy pretensions of Phelan for the entire property.

**In Conclusion.**--It seems to us that no one can read the record without being strongly impressed with the fact that a gross fraud and injustice has been perpetrated.

Our clients, unused to the ways of these Western adventurers, like the man who in olden time went down to Jericho, have fallen among thieves. They have been deprived of property whose value and rentals exceed the sum of thirty thousand dollars, without receiving one dollar of consideration. By the low cunning and duplicity of Blackman they have been deprived of even the shadow of consideration promised for the Hopper interest in the Lyon lot in New York.

When he has successfully invoked the relief accorded by a court of equity in his native State against the wrongdoers and seeks thereunder to reinstate himself in the possession of the Iowa land of which he had been defrauded, he is met with the assertion of the trial Court in Iowa, "*Your New York decree is not worth the paper it is written on*," and under the sanction of the Supreme Court of Iowa the whole valuable property with five years' rentals is turned over to one Phelan, the "*alter ego* of Blackman," who, with full notice of the fraud and without the payment of any consideration, is to pay some of the chief conspirator's (Blackman's) debts, including the fees of his attorney Duffie, for his assistance in consummating the fraud on Dull, and divide what is left between them.

In other words, for his manipulation of the fruits of the fraud, Phelan is to get the benefit of this

division of the property, in case the fraud is successfully consummated.

The District Court of Iowa, in considering the fraud of these conspirators, and while recognizing the strong equities of our client, said, in rendering its decision, "*I would like to beat this gang, but do not see how I can do it.*"

Surely a court of equity, in whose hands lie all the remedial powers of the ages, should not thrust from its doors a suitor pursued by the emissaries of fraud, or be heard to say that it is powerless to protect him.

We submit that on the record the Iowa Court should have rendered a decree in favor of the plaintiffs in error for not only Blackman's interest in the property, as shown by the contract of October 6, 1892, but for the entire interest against all of the defendants, and that the decree of the Iowa Court should be reversed and the case remanded ordering the Supreme Court of Iowa to enter such decree.

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Of Counsel.

# Supreme Court of the United States.

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|---|---|
| DANIEL DULL AND NELLIE M. DULL, Plaintiffs in Error, AGAINST JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE AND GEORGE F. WRIGHT, Defendants in Error. | No. 192. |

## Supplemental Brief on Behalf of Plaintiffs in Error.

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I.

ASSIGNMENTS OF ERROR.

1st. The court erred in paragraph 2 of the opinion in investigating the evidence of fraud between Dull and Blackman and holding that the fraud had not been established, for that the question of fraud had been expressly adjudicated and determined as between these parties by the supreme court of New York.

2nd. The court erred in paragraph 3 of the opinion in holding that the New York decree did not settle the title to the Iowa lands as between the parties thereto.

3d. The court erred in par. 4 of the opinion in holding that Blackman, at the time of the trial of the New York suit, had divested himself of all interest in the Iowa land.

4th. The court erred in par. 4 of the opinion that by the New York decree Dull obtained no rights as affecting his interest in the Iowa land.

5th. The court erred in par. 4 of the opinion in holding that the rights of Phelan and Duffie were not in any manner affected by the New York decree.

251 6th. The court erred in par. 4 of the opinion in holding that *the* the New York court by its decree had no jurisdiction to affect the title or equities relating to the Iowa land.

7th. The court erred in par. 4 of the opinion in holding that unless the conveyance was made under the New York decree the title to the Iowa land could not be affected thereby.

8th. The court erred in par. 5 of the opinion in holding that Dull had acquiesced in the fraud of Blackman, for the reason that all the matters relating thereto had been expressly adjudicated by the New York decree.

9th. The court erred in par. 5 of the opinion in holding that Dull was concluded by laches and acquiescence in the fraud of Blackman, for the reason that these matters, as well as all other matters in the controversy between Dull and Blackman, had been expressly adjudicated by the New York decree.

10th. The court erred in par. 6 of the opinion in holding that Dull, notwithstanding the adjudication of the New York supreme court, had been guilty of laches and acquiescence in the alleged fraud, and that by reason thereof was barred of any recovery.

11th. The court erred in holding in par. 6 of the opinion that Phelan, Savage, and Duffie were in no manner affected by the New York decree.

12th. The court erred in holding in par. 6 of the opinion that Phelan, Savage, and Duffie had acquired interests in the Iowa land which entitled them to protection.

13th. The court erred in holding under the pleadings and evidence that Phelan, Savage, and Duffie had any other or different interests in the Iowa lands than their fraudulent grantor, Blackman.

14th. The court erred in refusing to give to the decree of the supreme court of New York the full faith and credit to which it was entitled under section I, article IV, of the Constitution of the United States.

15th. The court erred in refusing to give to the decree of the New York supreme court the full faith and credit to which it was entitled under section 905 of the Rev. Statutes of the United States.

16th. The court erred in not entering up a decree in favor of appellants as prayed in their cross-petition.

II.

It is urged by the defendants in error, that Blackman has disappeared from the litigation through the intervention of Phelan and that only Phelan, Duffie and Wright have any interest in the decree complained of. The decree itself, however, shows that it was rendered in a cause in which Blackman was named as the party plaintiff, and besides it appears that the decree was for his benefit to the extent that it provided at least for the payment of some of his debts. So he was nominally and actually interested in it.

Blackman was in both the Iowa courts served with notice of appeal (108) represented by counsel who appeared and filed "Appellee's Abstract" in his name (111) and in the arguments and the citation of this court was duly served upon him (139).

From the inception of this case to the present time jurisdiction of Blackman has been retained at every step in the proceedings, and his presence here cannot be ignored.

The judgment of the Supreme Court of New York was plead not only in the cross petition as alleged, but in *both the answer* and *cross petition* as a basis of defense as well as for *affirmative* relief. It was brought into the record directly in answer to the amended petition which was *filed by Blackman* and *verified by Duffie almost thirty days after Phelan's petition of intervention was filed.* (7–11.)

It is claimed by defendants, p. 15, brief, that the court found that there was no judgment against Phelan in New York, and hence. the federal question was eliminated.

As the trial court took occasion to assert that "the New York decree was not worth the paper it was written on," counsel might as well have gone further and said that there was no judgment there against Blackman. It is this studied ignoring of the New York proceedings and judgment of which we complain and the whole argument *contra* seems to be based upon a circuitous reasoning which starts with the assumption that this New York case which was fought to a conclusion upon full pleadings, testimony and argument, and in which that court arrived at a final judgment favorable to the plaintiff in error was without a legal status and the judgment had no binding force on any one.

III.

We have already cited and commented upon the case of Burnley *vs.* Stephenson, 24 Ohio St., 74, and call attention to the fact that this case was cited with approval in the case of Harris *vs.* Ins. Co., 97 U. S., 336.

On the question of the finality of the New York decree as to the equities existing between Dull and Blackman, we wish to call attention to the syllabus in Swihart *vs.* Shaum, 24 Ohio St., 432.

A judgment in the absence of fraud or collusion is

conclusive evidence both as to the facts and the amount of indebtedness not only as between the parties to the judgment, but *as between and against the parties to whom the judgment debtor has conveyed the property sought to be subject to its payment*, and *this conclusive effect of the judgment is not affected by the fact that it was recovered after the conveyance of the property.*

The language of the Court is more explicit:

"The ground relied on is that the plaintiffs in error are not bound by the judgment because it is said they are not in privity with the judgment-debtor. We think otherwise. They claim the land in controversy under the judgment-debtor and are thus in privity with him. At the time of the conveyance the land was liable for the payment of the debts of the grantor. The conveyance being voluntary the grantees took the property, subject to the right implied by law in existing creditors, to have it appropriated to the payment of such demands as might, in good faith, be adjudged in their favor against the grantor."

* * * * * * *

"In our view, the judgment is not only conclusive as between the parties to it, but as between and against the parties to whom the judgment debtor had conveyed the property sought to be subjected to its payment, *and this conclusive effect of the judgment is not affected by the fact that it was recovered after the making of the conveyance.*"

See, also, 45 N. Y., 245.

Where a court of general jurisdiction exercises its powers upon a state of facts to be proven before it, the proof is presumed to have been made and *the existence of the fact cannot be collaterally denied.*

Pilsbury *vs.* Dugen, 9 Ohio, 117.

Maxson *vs.* Sawyer, 12 Ohio, 195.

If the court has jurisdiction of the parties and subject-matter, its judgment, however irregular or erroneous, is binding until reversed and neither it nor the title acquired under it can be attacked collaterally.

Bigelow *vs.* Bigelow, 4 Ohio, 138.
Douglass *vs.* McCoy, 5 Ohio, 522.
Calkins *vs.* Johnson, 20 Ohio St., 539.

Though party was not a privy a judgment may be introduced as a link in a chain of title.

Barr *vs.* Gratz, 4 Wheat., 213.

Decree in equity is binding on parties and their privies with notice.

Minn. Agl & Mech. Ass'n *vs.* Canfield, 121 U. S., 295.

Trustees and privies are bound by decree.

Green *vs.* Bogue, 158 U. S., 478.

After a decree establishing the invalidity of a deed the grantee cannot set up a title acquired through such deed. Where a court having jurisdiction of a case has framed a decree upon a certain issue, such issue can not be retried in a collateral action.

Franklin County *vs.* German Savings Bank, 142 U. S., 93.

Under Code Nebraska, Section 429, a judgment rendered for a conveyance in a State Court, not complied with by the parties within the time limited, *has the same op ration and effect as if the conveyance had been executed pursuant thereto.*

Langdon *vs.* Sherwood, 124 U. S., 74.

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